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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 669

JOHN N. MINNICH, PETITIONER,

vs.

RUSSELL GARDNER ET AL., INTERVENING CREDITORS, AND D. C. REILEY, TRUSTEE OF KING MOTOR CO., BANKRUPT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 18, 1933.

CERTIORARI GRANTED JANUARY 15, 1934.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 26, 1934.

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RECORD

Among the Rolls, records and judicial proceedings had in the District Court of the United States for the Western District of Pennsylvania at No. 15761 In Bankruptcy, may be found the following words and figures:

IN THE
DISTRICT COURT OF THE UNITED STATES
For the Western District of Pennsylvania

In the Matter of
KING MOTOR COMPANY, Bankrupt. } No. 15761 In Bankruptcy.

DOCKET ENTRIES

Aug. 30, 1930 Filing Fee.

Aug. 30, 1930 Creditor's petition filed.

Aug. 30, 1930 Rule granted returnable September 13th, 1930.

Aug. 30, 1930 Subpoena issued.

Sept. 4, 1930 Certified copy of proceedings in Circuit Court of Common Pleas, Bedford County, received and filed.

Sept. 9, 1930 Subpoena with Marshal's return thereon showing service of same filed.

Sept. 19, 1930 Said debtor adjudged bankrupt.

Sept. 19, 1930 Order of reference issued.

Nov. 17, 1930 Bankrupt's schedules filed.

Jan. 26, 1931 Referee having certified to the Court under Rule 8, the public sale of real estate, situate in Bedford, Bedford County, Pa., to Harry E. Cuppett for $52,000.00. Said sale confirmed absolutely.

Mar. 26, 1932 Referee's certificate on Review filed, together with petition for review, testimony, etc.

May 26, 1932 Petition for review, Referee's certificate on Review and schedule of distribution filed.

June 24, 1932 Order made directing the Referee to hold a new meeting for purpose of distribution.

Nov. 10, 1932 Referee's certificate on Review-re: wage claims of Russell Gardner, et al., filed, together with minutes of fifth meeting of creditors and distribution sheet.

Dec. 3, 1932 Order made authorizing Kountz and Fry to withdraw the minutes of testimony for period of seven days.

Dec. 19, 1932 Order made directing that the record on Referee's certificate of Review be returned to Referee so that he may enter an order of distribution. To the foregoing order, John N. Minnich excepts this 19th day of December, 1932, and Bill is sealed.

Jan. 13, 1933 Assignment of Errors filed.

Jan. 13, 1933 On petition order made allowing appeal.

Jan. 18, 1933 Citation issued returnable Feb. 17th, 1933.

Feb. 1, 1933 Citation mailed to Clerk of Circuit Court of Appeals.

Mar. 21, 1933 Exceptions to praecipe for record filed.

Mar. 25, 1933 Praecipe for record on appeal filed.

Mar. 25, 1933 Testimony taken before Referee filed.

Apr. 22, 1933 Order made directing that the time for printing record be extended to May 5th, 1933, nunc pro tunc as of February 17th, 1933.

Apr. 22, 1933 Order made directing that the record to be printed for the appeal shall consist of the following:

1. Docket entries.

2. The paper bearing the Referee's date October 20, 1932, and filed in this Court November 10, 1932, captioned "Distribution of the bankrupt estate by the Referee."

3. The summary of evidence filed the 25th day of March, 1933.

4. The petition for review.

5. Referee's certificate on review filed the 10th day of November, 1932.

6. Order of Court of December 19, 1932, and exception thereto.

7. Petition for appeal and order allowing appeal.

8. Assignments of error.

9. This order.

Apr. 22, 1933 Bond on appeal approved and filed.

DISTRIBUTION OF THE BANKRUPT ESTATE BY REFEREE

(Filed Nov. 10, 1932)

Balance in hands of D. C. Reiley, Esq., Trustee, as per his Account filed		$35,447.24
To D. C. Reiley, Compensation as Trustee on amount coming into his hands, to wit, $38,899.10		
$ 500.00 at 6%	$ 30.00	
1,000.00 at 4%	40.00	
8,500.00 at 2%	170.00	
28,899.10 at 1%	288.99	
Additional compensation of Trustee on amount coming into his hands in conducting the business, to wit, $2396.43, allowed under Section 48		
$ 500.00 at 6%	$ 30.00	
1,000.00 at 4%	40.00	
896.48 at 2%	17.93	
Total compensation as Trustee	$616.92	
The Trustee has taken credit with this amount in his account and received a check for the same.		
To J. Colvin Wright, Esq., and Kountz & Fry, Attorneys for petitioning creditors	$100.00	
To J. Colvin Wright, Esq., money paid out by him as follows:		
Filing Fee paid to Clerk	30.00	
Certification of Common Pleas record	2.00	
Marshall's Fee	24.52	156.54
Leaving		$35,290.70
To Alvin L. Little, Esq., Atty. for bankrupt		150.00
Leaving		$35,140.70

To Mrs. J. Howard Feight, Stenographer		15.00
Leaving		$35,125.70
To Mrs. Dorothy Johnson, Stenographer		90.00
Leaving		$35,035.70

To Eben H. Pennell, Esq., Referee, Fees & Allowances:

Clerical aid in preparing notice of first meeting of creditors	$ 10.00
Office accommodation first meeting of creditors	5.00
30 Claims proven before referee at first meeting of creditors, at 25c each	7.50
Clerical aid, etc., at second meeting of creditors	4.00
72 Notices of second meeting of creditors mailed by referee, 52 in excess of 20 at 20c each	10.40
Office accommodation at second meeting of creditors	5.00
Clerical aid, etc., at third meeting of creditors	4.00
Gazette Publishing Co., use of Referee printing notices for third meeting of creditors	2.75
75 Notices of third meeting of creditors mailed by referee, 55 in excess of 20 at 20c each	11.00
Office accommodation at third meeting of creditors	5.00
Clerical aid at fourth meeting of creditors	4.00
Gazette Publishing Co., use of Referee printing notices of fourth meeting of creditors	2.75

76 Notices of fourth meeting of creditors mailed by the referee, 56 in excess of 20 at 20c each	11.20	
Office accommodation at fourth meeting of creditors	5.00	
Telephone message to clerk's office from Bedford to Pittsburgh	.90	
Clerical aid at fifth meeting of creditors	4.00	
Inquirer Printing Co., use of Referee printing notices for fifth meeting of creditors	1.75	
Western Union Telegraph Co., telegrams to Harrisburg use of referee	.47	
76 Notices of fifth meeting of creditors mailed by the referee, 56 in excess of 20 at 20c each	11.20	
Office accommodation at fifth meeting of creditors	5.00	
Clerical aid in preparation of Report and Opinion	3.00	
Clerical aid on notice of application for discharge	10.00	
Referee's Commission 1% on $34,911.78	349.11	473.03
Leaving		$34,562.67

The referee finds that the total charges coming into the hands of the trustee amount to $38,899.10. This is made up of two funds; the personal property fund amounting to $6,899.10, and the real estate fund amounting to $32,000.00. A part of the personal property fund came into the hands of the trustee from the conduct of the business from the time the King Motor Company was adjudicated a bankrupt until the real estate was sold and the purchaser took possession. From the personal prop-

erty fund must be deducted the costs of conducting the business, consisting of storing cars and selling gas and oil in the large garage of the bankrupt. The expenses of conducting the business amounting to $2,383.79, must be paid out of the personal property fund. These are proper credits in the account of the trustee and are allowed.

The referee finds as a fact that the expenses of the bankruptcy proceeding such as the compensation of the trustee amounting to $616.92, the amount to be paid to J. Colvin Wright, Esq., and Kountz and Fay, Attorneys for petitioning creditors, together with the filing fees and costs paid by them amounting to $156.54, the fee to be paid to Alvin L. Little, Esq., Attorney for the bankrupt of $150.00, the amount paid to stenographers amounting to $105.00, the compensation of the referee $473.03, the appraisers fees amounting to $180.00, other bills amounting to $31.80, the bills for printing the notice of the first meeting of creditors $9.95, the bills for calling and clerking the sale of personal property amounting to $95.00 and for advertising the sale of personal property amounting to $9.50, totaling $1817.74, are the total costs of the bankruptcy proceeding.

The real estate at the time of the adjudication in bankruptcy was encumbered with numerous judgment liens thereon, must be paid to the lien creditors, undiminished by anything except the costs of sale.

The referee finds the personal property fund to be sufficient to pay the expenses and costs of the bankruptcy proceeding.

The referee finds that the real estate fund of $32,000.00 after paying certain tax liens thereon will not be sufficient to pay the judgment lien creditors in full.

The referee having made a former distribution in this estate to which a petition for review had been filed on the part of certain labor claimants and the former distribution having been lost, it is agreed that in the new distribution to be made by the referee certain taxes shall be paid entirely out of the real estate fund and $650.00 of

expenses heretofore charged to the personal property funds shall not be charged to the real estate fund. Leaving $1817.47 less $650.00 or $1167.47 of expenses to be paid by the personal property fund.

A copy of this agreement of settlement the referee is asked to insert in this distribution, it being as follows:

"J. Colvin Wright, Esq., representing labor claimants, in re- King Motor Company Bankruptcy, having filed exceptions to the appropriation by the Referee of the amount due the Commonwealth of Pennsylvania for capital stock and corporate loan taxes, and also to the allowance of all the expenses of the sale of the real estate of the bankrupt corporation out of the personal property fund, and for the purpose of securing an early adjustment of the matters in dispute and immediate distribution of the real estate fund, it is agreed between J. Colvin Wright, Esq., representing the labor claimants, and Hon. B. F. Madore, representing all the judgment lien creditors except John N. Minnich, Esq., that the exceptions heretofore filed to the items above mentioned shall be withdrawn and that the referee, in addition to the deduction for the expenses for the sale of real estate, amounting to $109.90, taxes due Bedford County amounting to $580.00, taxes due Bedford School District amounting to $974.40, and taxes due Bedford Borough amounting to $487.20, shall deduct from the said real estate fund all the capital stock and loan taxes due the Commonwealth amounting to $1929.60 and $650.00 as expenses of the sale of the real estate.

In consideration of the allowancce out of the real estate fund of all the capital stock and loan taxes due the Commonwealth, and of the additional $650.00 as expenses of the sale of the real estate, J. Colvin Wright, Esq., representing all of the labor claimants, as aforesaid, hereby waives for his said clients all rights of action which said labor claimants now have, or could have, for the recovery of any sum from First National Bank & Trust Company of Bedford, Pa., arising from the delivery of certain automobiles to said First National Bank & Trust Company

within four months of the adjudication of the King Motor Company as bankrupt.

J. COLVIN WRIGHT
Attorney for labor claimants.
B. F. MADORE,
Attorney for First National Bank & Trust Co., et al lien creditors."

September 2, 1932.

The referee finds as a fact that the bill for calling the sale of real estate of $10.00, the bills for advertising the sale of real estate $98.65 and for certified copy of order for the sale of real estate amounting to $1.25, together amounting to $109.90, must be paid entirely out of the real estate fund.

Total personal property fund	$6,899.10
Deduct costs of conducting the business	2,383.79
Leaving	$4,515.31
Deduct costs to be paid out of personal property funds	1,167.47
Leaving	$3,347.84

Seventeen labor claims have been filed with the referee upon which a preference is claimed for labor performed within three months prior to the filing of the petition in bankruptcy not to exceed $600.00 to each claimant under Section 64 B 5 of the Bankruptcy Act. These labor claims upon which a preference is claimed amount in the aggregate to $3,987.74.

There are certain tax claims against the bankrupt which are made liens on the personal property fund by statute and which must be first paid before the labor claims can be paid out of this fund.

The Department of Revenue of the Commonwealth of Pennsylvania, through the Bureau of Liquid Fuels, has filed with the referee, April 3, 1931, a claim for tax on liquid fuels covering the period from July 1929 to August 1930 with the penalties attached, amounting to

$3,053.74. This claim was not filed until after the trustee in bankruptcy had sold both the real estate and personal property of the bankrupt.

Section 12 of the Act of May 1, 1929, P. L. 1042 provides as follows: "All taxes collected by a dealer on consumer for the Commonwealth shall be considered a public account after being determined in the manner herein prescribed and as such, shall be a lien upon the franchises or property, both real and personal, of any dealer or consumer, after the same has been entered and indexed of record by the prothonotary of the county where the dealer's or consumer's franchises are situated." No entry of this claim or any part thereof was made by the prothonotary of the Court of Common Pleas of Bedford County, Pa., and this claim never was a lien on either the real estate or personal property of the bankrupt and is allowed by the referee as a common claim.

There has been filed with the referee by the Collector of Internal Revenue at Philadelphia, Pa., a claim for income taxes due the United States of America amounting to $912.16. This is made up of several items as follows:

Nature of Tax and Statute Involved. Give Section or Sections. Withholding and Income Taxes, Revenue Act 1926-1927-1928; together with interest at 1% per month until paid.

Year of Taxable Period ending	Amount of Tax	Interest Began
1922 W. T.	$ 38.63	3-10-30
1926 W. T.	59.86	
1927 W. T.	55.16	
1928 W. T.	52.02	
1929 W. T.	39.20	6-15-30
1929 I. T.	667.29	9-15-30

Attached to this claim is the following; "That this claim is entitled to be paid before all other claims, the priority of the United States for the payment of taxes

being fully determined by Sections 3466 of the Revised Statutes and Section 64 (a) of the Bankruptcy Act."

And attention is hereby called to Section 3467 of the Revised Statutes which provides: "That every executor, administrator, or assignee, or other person who pays any debt due by the person or estate for whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due and unpaid."

The claim for this tax was filed with the referee December 4, 1930, shortly before the sale of the personal property and real estate by the trustee.

Certain judgments became liens on the real estate of the bankrupt January 31, 1927, they being entered in the Court of Common Pleas of Bedford County, Penna., January 31, 1927.

The real estate fund is not sufficient to pay these liens in full.

Section 3186 of the revised statutes reads as follows:

"If a person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States, from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with the interest penalties and costs that may accrue in addition thereto upon all property and rights to property, belonging to such person; provided, however, that such lien shall not be valid as against any mortgage, purchaser or judgment creditor, until notice of such lien shall be filed by the collector in the office of the clerk of the district court of the district within which the property subject to such lien is situated. Provided further: whenever any state by appropriate legislation authorizes the filing of such notice in the office of the register or recorder of deeds of the counties of that state, or in the State of Louisiana in the parishes thereof, then such lien shall not be valid in that state as against

any mortgagee, purchaser or judgment creditors, until such notice shall be filed in the office of the register or recorder of deeds of the county or counties or parish or parishes in the state of Louisiana, within which the property subject to the lien is situated."

The referee finds that this claim for Federal Income taxes is entitled to participate only as a general claim, and it is allowed as such; but it is not a lien and cannot affect the judgment liens prior thereto.

"The claim of the government extends only to that which was the property of the debtor when he became insolvent and his property is only that, in substance, which remains after the satisfaction of liens upon it."

"It has been uniformly held in all the cases that the priority of the United States does not disturb any specific liens not the perfected lien of a judgment, that is, it does not supersede a mortgage on land nor a judgment made perfect by the issuance of an execution and levy on land."

In the matter of The Coswell Construction Company, Bankrupt, S.A. B. R. (N. S.) 31, See page 31.

On March 21st, 1929, John N. Minnich, a creditor, entered a judgment against King Motor Company to No. 190 April Term, 1929, in the Court of Common Pleas of Bedford County, and on the same day another judgment was entered by John N. Minnich against King Motor Company to No. 191 April Term, 1929, in the Court of Common Pleas of Bedford County; executions were issued on both judgments on March 26th, 1929, and on the same day a levy was taken of the personal property of the King Motor Company and endorsed on the writs by J. M. Fink, Sheriff of Bedford County, Pennsylvania. These executions have been continued from time to time, and on August 2[illegible], 1930, clauses of Fieri Facias were added to the vendices and the sheriff directed to proceed to sell all the goods on hand and the same were advertised for sale. The said John N. Minnich claims a lien on the goods levied upon on March 26, 1929, by virtue of his executions.

From the offers made and the testimony taken, the Referee finds the following facts:

1. That on March 21, 1929, John N. Minnich entered a judgment in the Court of Common Pleas of Bedford County, Penna., to No. 190 of April Term, 1929, against the King Motor Company for Six Thousand Seven Hundred Eighty-eight Dollars and Sixty Cents. Costs use of Attorney Minnich, $1.75.

2. That on the above judgment a Fieri Facias was issued out of the Court of Common Pleas of Bedford County, Penna., to No. 62 of April Term, 1929, and on the same day the sheriff levied upon all the personal property of the King Motor Company and endorsed the same on the writ. To this Fi. Fa. the sheriff returned "goods on hand not sold."

3. That a Venditioni Exponas was issued upon the above Fieri Facias to No. 12 of September 12, 1929, to which Ven. Ex. the Sheriff returned "goods on hand not sold, writ not executed for want of time."

4. That an Alias Venditioni Exponas was issued to No. 12 of November Term, 1929, directing the sheriff to sell the goods, to which Al. Ven. Ex. the sheriff returned "goods on hand not sold."

5. That a Pluries Venditioni Exponas was issued to No. 13 of January Term 1930 to which the sheriff returned "goods on hand not sold, writ not executed for want of time."

6. That a second Pluries Venditioni Exponas was issued to No. 17 of April Term 1930, to which the sheriff returned "goods on hand not sold, writ not executed for want of time."

7. A third Pluries Venditioni Exponas was issued to No. 22 of September Term, 1930.

8. That on August 23, 1930, a clause of Fieri Facias was attached to the third Pluries Venditioni Exponas No. 22 of September Term, 1930, and on the same day an ad-

ditional levy was taken by the sheriff of Bedford County upon the personal property of the King Motor Company acquired since the original levy and the same was endorsed upon the writ.

9. That on August 21, 1930, the said John N. Minnich, directed the sheriff in writing that he must advertise all the goods taken under the original levy of March 26, 1929, and those taken under the attached clause of Fi. Fa. on August 21, 1930, and that the said sheriff must close up the place and sell the goods immediately.

10. That the sheriff of Bedford County on August 21, 1930, under and by virtue of the Venditioni Exponas issued to No. 22 of September Term, 1930, and the clause of Fi. Fa. thereto attached, advertised for sale to be held on August 29th, 1930, all the personal property of the King Motor Company.

11. That on August 25, 1930, to No. 2 of September Term of 1930 in the Court of Common Pleas of Bedford County, Pennsylvania, sitting in equity, a receiver was appointed for the King Motor Company, and it was ordered that the above execution be stayed until the final determination of the matter.

12. That on March 21, 1929, John N. Minnich entered a judgment in the Court of Common Pleas of Bedford County, Pennsylvania, to No. 191 of April Term, 1929, against the King Motor Company in the amount of eight hundred dollars. Costs use of Attorney Minnich, $1.75.

13. That on the above judgment a Fieri Facias was issued out of the Court of Common Pleas of Bedford County, Pennsylvania, to No. 63 of April Term, 1929, and on the same day the sheriff levied upon all the personal property of the King Motor Company and endorsed the same on the writ. To this Fi. Fa. the sheriff returned "Goods on hand not sold."

14. That a Venditioni Exponas was issued to No. 13 of September Term, 1929, to which the sheriff returned

"goods on hand not sold, writ not executed for want of time."

15. That an Alias Venditioni Exponas was issued to No. 9 of November Term, 1929, to which the sheriff returned "goods on hand not sold."

16. That a Pluries Venditioni Exponas was issued to No. 12 of January Term 1930, to which the sheriff returned "goods on hand not sold, writ not executed for want of time."

17. That a second Pluries Venditioni Exponas was issued to No. 17 of April Term, 1930, to which the sheriff returned "goods on hand not sold, writ not executed for want of time."

18. That a third Pluries Venditioni Exponas was issued to No. 23 of September Term, 1930.

19. That on August 21, 1930, a clause of Fieri Facias attached to the third Pluries Venditioni No. 23 of September Term, 1930, and all the personal property of the King Motor Company not levied upon under the original execution was levied upon by the sheriff on August 21, 1930, and the levy endorsed on the writ.

20. That the said John N. Minnich on August 21, 1930, directed the sheriff in writing that he must shut up the place of business of the King Motor Company and advertise and sell the goods which had been levied upon.

21. That on August 21, 1930, by virtue of the original levy and the additional levy taken under the attached clause of Fi. Fa. the Sheriff advertised the personal property of the King Motor Company for sale on August 29, 1930.

22. That on August 25, 1930, a receiver in equity was appointed for the King Motor Company by the Court of Common Pleas of Bedford County, Pennsylvania, and it was ordered by said Court that all executions should be stayed until the final determination of the matter.

23. That John N. Minnich notified D. C. Reiley, Esq., who had been appointed Receiver, that he had a

lien by virtue of his executions upon the personal property of the King Motor Company.

24. That on September 19, 1930, the King Motor Company was declared an involuntary bankrupt and on October 21, 1930, D. C. Reiley, Esq., was elected Trustee of the bankrupt estate.

25. That immediately after the election of the Trustee, John N. Minnich gave notice in writing to D. C. Reiley, Esq., the Trustee, that he had a lien upon the personal property of the King Motor Company which had been levied upon on March 26, 1929, and notified the said Trustee not to interfere with said personal property and asked that the same should be separate and apart from any other goods, and if the Trustee did take charge of this personal property that he should sell it separate and apart from any other personal property.

26. That the matter was taken up before the meeting of the creditors and on December 2, 1930, at an adjourned first meeting, the inventory of all the personal property of the King Motor Company was gone over in detail, and the items which were on hand on September 19, 1930, the date of the adjudication, and which had been levied upon on March 26, 1929, were marked and separated from the articles appearing on the inventory upon which a levy had not been taken on March 26, 1929.

27. That the Trustee did not sell the personal property upon which the levy had been taken on March 26, 1929, separate and apart from the other goods of the bankrupt and filed his account showing the sale of the personal property as a whole.

28. On April 14, 1931, at the third meeting of the creditors, the accounts of D. C. Reiley, Esq., Trustee, was presented for approval, and John N. Minnich filed exceptions on the ground that the Trustee had failed to keep separate and apart the amount received from the items of personal property upon which a levy had been taken on March 26, 1929.

29. That the sale list was examined and compared with the inventory which had been marked and it was decided that the goods which had been levied upon on March 26, 1929, and had been sold by the Trustee, represented fifty per cent of the selling price of all the personal property. The personal property sold for Three Thousand Five Hundred Fifty Two Dollars and Thirty Five Cents, and that One Thousand Seven Seventy Six Dollars and Seventeen Cents should be the value of the personal property levied upon by the sheriff on March 26, 1929.

30. That the levies taken by the sheriff of Bedford County, Pennsylvania, on the personal property of the King Motor Company by virtue of Fieri Facias No. 62 and 63 of April Term, 1929, were kept alive by the proper issuing of Vendices.

31. That any delay by John N. Minnich was in good faith and in furtherance of a genuine intention to collect his debt.

32. That the said John N. Minnich did not in fact hinder any creditors or later executions.

33. That the executions of John N. Minnich are a valid lien, more than four months old, upon the personal property of the King Motor Company levied upon on March 26, 1929.

34. That the sum of $1776.17 must be applied to executions Nos. 62 and 63 of April Term 1929 diminished only by the amount of costs which would have been necessary if sold by the sheriff of Bedford County.

35. That the costs if sold by the sheriff would have been $2.00 holding sale and clerk, and $16.38 poundage. Total $18.38.

36. That the amount to be applied executions No. 62 and 63 of April Term, 1929, is $1757.79 and will pay 88.9 per cent upon execution No. 62 or $1562.68 and 11.1 per cent upon Execution No. 63 or $195.11.

37. That John N. Minnich released any claim to the after acquired personal property levied upon on August 21, 1930, by virtue of the clause of Fieri Facias added to the Veindices.

The execution and levy in the Court of Common Pleas of Bedford County, Pennsylvania, by the Creditor more than four months before the bankruptcy gave a lien upon the bankrupt's property to the extent of the judgment interest and costs.

This lien being obtained more than four months prior to the filing of the petition, is not only not to be deemed null and void, but its validity is recognized. The Trustee was vested by operation of law with the title of the bankrupt subject to this lien.

The wage claimants have objected to this lien for the reason that the execution had been issued eighteen months prior to bankruptcy.

The validity of a lien is determined by the law of the State where it is created and under the laws of the State of Pennsylvania the lien was not void.

The law is laid down in Platt-Barber and Co., vs. Groves 193 Pa. 475 as follows:

"The rule is well established that an execution which is not put in the sheriff's hands bona fide intention of collecting the debt, but merely to be held as a security; or to prevent other creditors from coming upon the debtor's goods, is fraudulent as to them, and will be postponed to subsequent levies. And stay, or unusual delay of the proceedings, allowing the debtor to sell or otherwise to deal with the goods in contravention of the levy, and other acts of similar nature, give rise to a presumption of want of good faith; Dorrance's Admr. vs. Com., 13 Pa. 159; Earl's Appeal, 13 Pa. 483; Freeburger's Appeal, 40 Pa. 244. Such acts, however are not frauds per se, but only evidence of fraud, which may be rebutted, and if the creditor's delay is shown to be in good faith and in furtherance of a genuine intention to collect his debt, he will not be

postponed. Indulgence is not in itself fraudulent, but on the contrary, is sometimes good policy for the creditor as well as mercy to the debtor, especially where as in the present case, the subject of the levy is a store or going business of any kind. There is no fixed time by which such acts are to be judged. The test is good faith and absence of actual hindrance of others. As long as the creditor is honestly seeking collection even by coaxing, and is not, in fact, hindering later execution, so long his indulgence to the debtor will not be a bar to his maintenance of his priority of levy.

"The earlier cases undoubtedly applied the presumption of fraud with great strictness, and exhibit a tendency to treat it as a rule juris et de jure. But it was never divorced intentionally from its true principal, and the later decisions have treated the question more liberally as one of fraud in fact to be determined in each case by the evidence; Broadhead vs. Cornman, 171 Pa. 322; Landis vs. Evans, 113 Pa. 322; Stroudsburg Bank's Appeal, 126 Pa. 523.

"In the present case the evidence shows a clear intent to collect the money, never relinquished or interrupted, and restrained only by an indulgence as to time, as much in the interests of the creditors as of the debtor. The testimony of the deputy sheriff shows that the debtor was negotiating for a loan that would enable him to pay off the debt, and had at least one person willing to advance the money if secured as proposed. The extent of the delay was not fixed by appellant, but by the deputy, who acted partly on his own confidence that the debtor would secure the loan. As the plaintiff's executions amounted to more than $1,200.00, and the store property only producted $700.00 at the sale, it is manifestly good business policy, as well as humanity on the part of the appellant, to indulge efforts of the debtor to secure the money by loan. There was not a trace of any intention to refrain

from exacting payment, or of helping the debtor to hinder other creditors. The presumption arising from the stay of immediate proceedings on the execution was fully met and overcome by the affirmative evidence of good faith."

The evidence shows that the creditor, John N. Minnich, issued his writ with an intention to collect his money and that he never relinquished or interrupted, there was no intention to refrain from exacting payment, or of helping the debtor to hinder other creditors, and the Referee is of the opinion that the creditor acted in good faith. And in this case it was good business policy to indulge when we consider the creditor's executions amounted to almost $9,000.00 and that he realized less than $2,000.00.

As the Supreme Court of Pennsylvania has said, "The test is good faith and an absence of actual hindrance of others." And the Referee is of opinion that John N. Minnich acted in good faith and that he did not hinder any one.

The creditor, John N. Minnich, gave specific directions in writing to the sheriff that he must proceed on August 21, 1930, and the sheriff did proceed and advertise the goods for sale, this was before anything had intervened and before bankruptcy proceedings had been instituted.

This action, if the lien had become dormant, would have revived its priority; and no rights having intervened the lien was not affected by delay.

Total Personal Property Fund	$6,899.10
Deduct expense of conducting the business	2,383.79
Leaving	$4,515.31
Deduct costs to be paid out of personal property	1,167.47
Leaving	$3,347.84

To be applied to the following Executions:

	No. 190 April Term 1929.
	Fi. Fa. No. 62 April Term 1929.
	Vend. Ex. No. 12 Sept. Term 1929.
	Al. Vend. Ex. 12 Nov. Term 1929.
John N. Minnich	Pluries Vend. Ex. No. 14 Jany. Term 1930.
vs.	Second Pluries Vend. Ex. No. 16 April Term 1930.
King Motor Co.	Third Pluries Vend. Ex. No. 22 Sept. Term 1930.
	August 25, 1930, this writ stayed by order of Court.
	Debt, Interest and Costs $8,100.93.

To be applied to this writ out of personal property fund $1,562.68

Leaving $1,785.16

	No. 191 April Term 1929.
	Fi. Fa. No. 63 April Term 1929.
	Vend. Ex. No. 13 Sept. Term 1929.
	Alias Vend. Ex. No. 9 Nov. Term 1929.
John N. Minnich	Pluries Vend. Ex. No. 13 Jany. Term 1930.
vs.	Second Pluries Vend. Ex. No. 17 April Term 1930.
King Motor Co.	Third Pluries Vend. Ex. No. 22 Sept. Term 1930.
	August 25, 1930, this writ stayed by order of Court.
	Debt, Interest and costs $1,010.05.

To be applied to this writ out of personal property fund $195.11

Leaving $1,590.05

The balance of the personal property fund amounting in the aggregate to $1,590.05 must be applied to seventeen labor claims which are preferred under Section 64 B 3 of the Bankruptcy Act. These claims amount in the aggregate to $3,987.74 and will receive a dividend of .3987 cents on each $1.00 claim, or 39.87%.

To J. Colvin Wright, Esq., Attorney for Labor Claimants, as follows:

Amount carried forward		$1,590.05
Russell Gardner,	Claim	Pro Rata
Bedford, Pa.	$522.00	$208.12
Albert Barkman,		
Clearville, Pa., R. F. D.	390.40	155.65
Frank James,		
Rainsburg, Pa.	460.75	183.70
Clarence H Smith,		
Mann's Choice, Pa.	330.00	131.58
Grant Grimes,		
Bedford, Pa.	329.72	131.47
Randolph Burket,		
Bedford, Pa.	197.66	78.82
James Perdew,		
Bedford, Pa.	178.02	70.99
Alton Drenning,		
Everett, Pa., R. F. D.	165.00	65.78
David Bloom,		
Bedford, Pa.	130.37	51.99
Donald Smith,		
Everett, Pa., R. F. D.	73.24	29.21
W. M. Williams,		
Bedford, Pa., R. F. D. 4	334.43	133.35
Melvin Blankley,		
Bedford, Pa., Star Rt.	39.16	15.62
Henry F. Kagarise,		
New Enterprise, Pa.	207.00	82.54
R. L. Housel,		
Bedford, Pa.	261.81	104.39
J. King Henry,		
Bedford, Pa.	242.74	96.79

John Stiver, Bedford, Pa.	72.10	28.76
Esther Kauffman, Bedford, Pa.	53.34	21.28
		$1,590.05

On October 8, 1930, the Department of Revenue of the Commonwealth of Pennsylvania filed with the Referee preferred claims for taxes amounting in the aggregate to $5037.48, made up of eighteen separate items all proved as one preferred tax claim.

The Board of Finance and Revenue of Commonwealth of Pennsylvania has made a tentative resettlement of these taxes in the sum of $1929.60 and has notified the referee of this by letter from the Department of Revenue of the Commonwealth to Eben H. Pennell, Referee, dated July 18, 1932.

The above amount of $1929.60 due to the Commonwealth of Pennsylvania has already been paid to the Commonwealth of Pennsylvania by the Trustee and is to be charged to the balance of the real estate fund.

The attention of the Court is respectfully directed to the Act of April 9, 1929, Section 1401 P.L.429 as follows: "All state taxes imposed under the authority of any law of this Commonwealth, now existing or that may hereafter be enacted, and unpaid bonus, interest, penalties, and all public accounts settled against any corporation, association or person, shall be a first lien upon the franchises and property, from the date of settlement, and whenever the franchises or property of a corporation association, or person shall be sold at a judicial sale, all taxes, interest, bonus and penalties and public accounts due the Commonwealth, shall first be allowed and paid out of the proceeds of such sale before any judgment, mortgage or other claim or lien against such corporation, association or person."

Total Real Estate Fund		$32,000.00
Deduct expenses to be paid out of real estate fund		109.90
Leaving		$31,890.10
Deduct costs to be paid out of real estate fund as per agreement of settlement		650.00
Leaving		$31,240.10
The following tax claims must be paid out of the real estate fund:		
1. State and County taxes for year 1930	$580.09	
2. Harry E. Cuppett, Col. School tax for Bedford Borough for year 1930	974.40	
3. Harry E. Cuppett, Col. Borough tax for Bedford Borough for year 1930	487.20	2,041.60
Leaving		$29,198.50
Amount of taxes due the Commonwealth of Pennsylvania to be paid out of real estate fund		1,929.60
Leaving		$27,268.90

In accordance with the facts as found, the Referee makes the following

DISTRIBUTION

The balance of the real estate fund, amounting to $27,268.90, must be applied to and prorated among certain judgment liens entered January 31, 1927, in the Court of Common Pleas of Bedford County, Pa., to Nos. 40 to 51 inclusive, of April Term, 1927, which became liens against the real estate of King Motor Company January 31, 1927. These liens with debt, interest and costs thereon amount to $40,378.78, the fund to be applied to them amounts to $27,268.90 and each $1.00 of the amount of the lien will receive .6753 cents.

The Referee declares a dividend of 67.53⅓ payable to the lien creditors on each $1.00 of amount of lien.

	No. 40 April Term, 1927	
Harry E. Cuppett	Debt	$8,300.00
	Interest	128.65
vs	Costs use of Plaintiff	4.85
King Motor Co.	Total	$8,433.50
	Applied to Lien	$5,695.34
	No. 41 April Term 1927	
Same	Debt	$4,000.00
	Interest	62.00
vs	Costs use of Plaintiff	4.85
Same	Total	$4,066.85
	Applied to Lien	$2,746.44
	No. 42 April Term, 1927	
John P. Cuppett	Debt	$2,500.00
	Interest	32.50
vs	Costs use of Plaintiff	1.65
King Motor Co.	Total	$2,534.15
	Applied to Lien	$1,711.39
	No. 43 April Term, 1927	
Same	Debt	$2,500.00
	Interest	32.50
vs	Costs use of Plaintiff	1.65
Same	Total	$2,534.15
	Applied to Lien	$1,711.39
	No. 44 April Term, 1927	
Same	Debt	$1,000.00
	Interest	13.00
vs	Costs use of Plaintiff	1.65
Same	Total	$1,014.65
	Applied to Lien	$ 685.22

	No. 45 April Term, 1927	
M. Florence Cuppett	Debt	$2,000.00
	Interest	26.00
vs	Costs use of Plaintiff	1.65
	Total	$2,027.65
King Motor Co.	Applied to Lien	$1,369.32

	No. 46 April Term, 1927	
First National Bank of Bedford, Pa.	Debt	$1,000.00
	Interest	220.00
vs	Costs use of Plaintiff	1.65
	Total	$1,221.65
King Motor Co.	Applied to Lien	$ 825.02

	No. 47 April Term, 1927	
Same	Debt	$1,000.00
	Interest	216.00
vs	Costs use of Plaintiff	1.65
	Total	$1,217.65
Same	Applied to Lien	$ 822.32

	No. 48 April Term, 1927	
Same	Debt	$1,000.00
	Interest	218.50
vs	Costs use of Plaintiff	1.65
	Total	$1,220.15
Same	Applied to Lien	$ 824.00

	No. 49 April Term, 1927	
Same	Debt	$4,320.55
	Interest	902.99
vs	Costs use of Plaintiff	1.65
	Total	$5,225.19
Same	Applied to Lien	$3,528.77

	No. 50 April Term, 1927	
Same	Debt	$1,989.00
	Interest	432.55
vs	Costs use of Plaintiff	1.65
Same	Total	$2,423.20
	Applied to Lien	$1,636.49

	No. 51 April Term, 1927	
C. A. Diehl,	Debt	$6,961.60
Treasurer,	Interest	1,496.74
	Costs use of Plaintiff	1.65
vs		
King Motor Co.	Total	$8,459.99
	Applied to Lien	$5,713.20

Respectfully submitted,
(Sgd.) EBEN H. PENNELL,
Referee in Bankruptcy.

Bedford, Penna., October 20, 1932.

SUMMARY OF EVIDENCE
(Filed March 25, 1933.)

TESTIMONY OF WITNESSES:

W. A. King called by the wage claimants testified as follows:

I was President and Manager of the King Motor Company for a period of years prior to 1930. The King Motor Company was organized in 1920, one of the assets of the Company was a large garage building in the Borough of Bedford, about January 21, 1927, certain judgments were entered against the real estate, and the Corporation had a large indebtedness at that time.

At the time of the entering of these judgments I talked to various creditors individually to know what was going to happen, but there was positively no agreement made between myself and any individual creditor as to any delay.

In the latter part of March, 1929, John N. Minnich issued two executions against the King Motor Company which caused considerable stir among the other creditors, and it was attempted to hold a meeting of the creditors on Easter Monday of 1929 to discuss the financial condition of the Company. John N. Minnich was there with other creditors, the meeting only lasted three minutes as one of the creditors walked out and the meeting was adjourned. At this time the King Motor Company was involved, I think it was publicly known.

At a latter time I had a conversation with Mr. Minnich about his executions, it was my argument that we were entering a good year in a business way and if given a chance we could possibly work out but there was no agreement with the creditors, and there was no financial break up at that time.

We continued the business of the Corporation entirely the same as if there were no execution liens on the personal property, and sold personal property in due course of business from time to time, and it was fully known to the public and to the creditors. The Sheriff issued a levy but did not take physical possession of the assets and we did not notify the sheriff when we were going to sell an automobile or anything but simply sold them in the due course of business aside from the levy. After the first five months in 1930 the business of the King Motor Company got worse to such an extent that as President and Manager of the Corporation I filed a petition in the Court of Common Pleas of Bedford County on the 25th day of August, 1930, in which I swore the Corporation was insolvent at that time.

The Corporation was insolvent for a period of thirty or forty-five days preceding August 25th, 1930.

On cross examination Mr. King testified:

There was no meeting of any character of the creditors until after the executions of John N. Minnich were issued and there was no agreement of the creditors at any time in relation to our continuance of business and there

never was any agreement between myself as an officer of the King Motor Company or myself as an individual and John N. Minnich that Mr. Minnich refrain from pressing his executions; there was no agreement whatsoever in regard to it.

John N. Minnich testified as follows:

I am the plaintiff in Judgments Nos. 190 and 191 of April Term, 1929, and I issued executions upon both judgments. At the time I issued the executions it was my only purpose to collect my money. It was not done for the purpose of a lien. At the time that I issued the writs I gave the Sheriff instructions to make my money. I never interfered with the Sheriff in any way in his conduct with these writs. In 1930 on August 21, I caused a clause of fieri facias to be added to each of the vendices which were outstanding at that time and I gave Sheriff Fink special orders that he levy upon everything of the King Motor Company except what he had levied on before, not to levy upon anything that he had levied upon before; that he was to levy upon the cars and the trucks and take the engine numbers; that there was a brown sedan that was in use, he was to be sure to get it; that he was to levy on the gas and oil; that he was to measure the gasoline in the tanks and note the gallons. I wrote those instructions down for him. This is the original paper which I gave Sheriff Fink (presents paper) at the time and I offer the same in evidence as Exhibit No. 1. I also gave the Sheriff instructions that he was to absolutely shut the place up tight, that no business whatever should be conducted, and that he should advertise and sell the goods immediately, and the Sheriff did take a second levy, or rather an additional levy, and posted his sale bills, although he was instructed to lock the place up, over my objection he left it open, and I even made the objection after he left it open that he was to go back and close it but it still stayed open. After the receiver was appointed I gave Mr. Reiley notice verbally that he should not interfere with those goods upon which I had a levy. After the bankruptcy proceedings were begun and the King Motor Company was de-

clared a bankrupt, and Mr. Reiley was elected Trustee, I gave Mr. Reiley a notice in writing. I have asked Mr. Reiley to produce that notice and he is unable to find the same. That notice which I gave him was that he should not interfere with the goods upon which I had a levy and that if he took charge of them or sold them, he should keep them separate and apart from any other goods, and when he sold them he should sell them separately. I brought the matter before the hearing in bankruptcy and meetings were held, at which time all the goods upon which I had a lien, by virtue of the levy taken in 1929, were definitely marked in the inventory and Mr. Reiley was given notice to sell these separately, and it was so agreed at the meeting of the creditors. Mr. Reiley did not sell those goods separately, and at the meeting of creditors when his sale was up for confirmation, or his account, I do not recall which, the matter was brought up again and an effort was made to go over the sale list and show just what the articles under my levy brought and those which were not under my levy. In going over the same it was discovered that 50% represented as near a fair value as possible, and it was agreed by the creditors that 50% of the sale of the personal property should be considered as the goods which had been sold upon which I claim to have a lien by virtue of my executions issued in 1929. I will further state that I never had any understanding or agreement with King Motor Company or Mr. W. A. King as General Manager individually, or with any other person by which I agreed to hold off or continue my executions. My intention always was that I wanted my money and the only thing that I had in consideration was how best to get it. I never believed the King Motor Company to be insolvent. I was very well acquainted with the books and although they had an indebtedness, I always felt that they had sufficient assets to pay their debts. I had no knowledge of any insolvency and insolvency was never mentioned to me by any one.

I do not feel that the King Motor Company was in an insolvent condition as early as the year 1927, nor in the year 1929 at the time that I issued my executions. I do

know that the King Motor Company owed money, that they had borrowed money, but I did not feel that they were in a condition whereby it would break them up or anything of that kind. I considered them perfectly solvent.

My honest and bona fide intention and the only thing I had in mind was to get my money. I always had that intention and it was the only end toward which I was working.

John N. Minnich on cross examination testified:

I issued Fieri Faciases and then issued a number of Vendices, at the time of issuing the various Vendices I realized the Sheriff had not sold the personal property; I gave him instructions each time that I wanted my money.

I knew the place was open for business and they were doing business, I did not know what they were selling.

I did not know that the Sheriff had not taken physical possession of the property because I knew the Sheriff was down to take possession of it and that he had levied on the items, I did not know that the articles on which I now claim a lien were just left in the possession of the King Motor Company and handled and disposed of in the due course of business, I knew that the Sheriff had levied on them, that he had endorsed a levy on his writ and I believe that he had handled the same as he did in all writs which he executed in his official capacity, I had given him no instructions not to do anything.

I did not issue any execution for the purpose of preventing any other creditor from getting a lien or collecting his money. I also want to state that Mr. Reiley, the Trustee in Bankruptcy, always recognized my liens, he recognized it to such an extent that while he was in operation, if some one came to buy a part which I claimed to have a lien on he would come and ask me if he could sell it before he would sell it.

I did not act to prevent any other creditors from enforcing his rights or getting a lien.

WRITS OFFERED IN EVIDENCE

Fieri Facias No. 62 April Term, 1929, John N. Minnich vs. King Motor Company by W. A. King, President, issued out of the Court of Common Pleas of Bedford County, Pennsylvania, in No. 190 April Term, 1929, levy endorsed thereon and return:

BEDFORD COUNTY, SS:

The Commonwealth of Pennsylvania.

To the Sheriff of Bedford County, Greeting:

(Seal) We command you.....

that of the goods and chattels, lands and tenements of King Motor Company, by W. A. King, President, late of your county yeoman in your bailiwick, you cause to be made and levied the sum of Six Thousand Seven Hundred Eighty Eight and 60-100 dollars which includes $..... Attorney's Commission, lawful money of the United States, which John N. Minnich lately in your county Court of Common Pleas, before our Judges at Bedford, recovered against King Motor Company, by W. A. King, President, for its debt as also one and 75-100 dollars, for its costs which he sustained by occasion of the detention of that debt, whereof the said King Motor Company, by W. A. King, President, is convict as appears of Record. And have that money before our Judges, at Bedford, at our County Court of Common Pleas, there to be held the Third Monday of April next, to render the said John N. Minnich for its debt and costs aforesaid. And have you then and there this writ.

Witness the Honorable Thos. F. Bailey, Esquire, President Judge of our said Court the 27 day of Feb. Anno Domini, one thousand nine hundred and 29.

(Sgd.) H. J. PLEACHER,
Prothonotary.

Received this writ at 1.45 o'clock p. m. March 26, 1929. (Sgd.) J. M. FINK, Sheriff.

March 27, 1929, by virtue of the within writ I have levied on the following personal property, viz:

1 Ford pick up truck, 1 Tudor Sedan, 2 spring racks, 3 Fordor Sedans, 4 Coupes, 3 Desks, 2 sets of shelving, 7 chairs, 2 sets of steel bins, 2 safes, 1 glass rack, 2 typewriters, 1 adding machine, 1 mimeograph machine, 2 coat racks, 2 electric fans, 1 filing case, 2 small filing cabinets, 1 check writing machine, 1 lot of auto parts, 1 lot of accessories, 5 bins of parts, 2 wheels and tire racks, 1 work table, 1 invoice machine, 1 show case, 1 rack for long parts, 3 sections of cabinets for small parts, 1 tool board on rollers, 2 tool cabinets, 1 bolt and lock washer cabinet, 1 set lapping dies, 1 Manly ½ ton crane, 1 Tractor Motor stand, 1 Model A & T Motor stand, 1 Press stand, 1 model A & T Reaming & Rehoning machine, 1 Dixe Rear End stand, 1 kink wag valve machine, 1 Arbor Press, 1 drill machine Superior, 1 lot of Lincoln Tools & Cabinet, 3 Tool Benches Steel, 1 forge, 1 large tool bench, & equipment attached, 1 Generator stand, 1 emery stone stand, 1 Bean water pressure pump, 1 lot of small tools, 1 time clock, 1 desk, 1 coil tester, 3 electric drills, 3 sets chain blocks, 1 set model A Rebabiting Tools & Desk, 1 set Model T Rebabiting Tools, 1 Manley Jack, 2 lift jacks, 1 burning in stand, 1 radiator stand, 1 magnet recharger, 1 lifter car, 1 Manley grease rack, 1 Alemite Equipment complete, 1 air compressor, 1 wooden bench, 1 shop truck, 1 welding outfit, 1 porto stat, 2 Rebabiting torches complete, 1 Tractor Rebabiting outfit, 1 Battery recharger outfit, 1 Cadillac Car with Crane, 1 Brake lining machine, 1 set of Tractor tools, 1 Dodge Roadster, 1 Ford Roadster, 2 old Ford Touring Cars, 1 Ford Coupe, 1 Ford Model A Tudor wrecked, 1 Buick Roadster, 2 Ford Touring Cars, 1 Essex Coach, 1 Moon Touring Car, 1 Ford Fordor Car, 1 Ford Tudor Car.

And all defendant's other personal property, seized and taken in execution as the property of King Motor Company, by W. A. King, President.

April 15, 1929. Sheriff returns goods on hand not sold.

So answers,

(Sgd.) J. M. FINK, Sheriff.

Vend. Ex. No. 12 September Term, 1929, issued to Fi. Fa. No. 62 April Term, 1929, and return:

BEDFORD COUNTY, SS:

The Commonwealth of Pennsylvania.
To the Sheriff of Bedford County, Greeting:
(Seal) We command you, as we before commanded you that of the goods and chattels of King Motor Company, by W. A. King, President, late of your county yeoman in your bailiwick, viz:

1 Ford pick up truck, 1 Tudor Sedan, 2 spring racks, 3 Fordor Sedans, 4 Coupes, 3 desks, 2 sets of shelving, 7 chairs, 2 sets of steel bins, 2 safes, 1 glass rack, 2 typewriters, 1 adding machine, 1 mimeograph machine, 2 coat racks, 2 electric fans, 1 filing case, 2 small filing cabinets, 1 check writing machine, 1 lot of auto parts, 1 lot of accessories, 5 bins of parts, 2 wheels and tire racks, 1 work table, 1 invoice machine, 1 show case, 1 rack for long parts, 3 sections of cabinets for small parts, 1 tool board on rollers, 2 tool cabinets, 1 bolt and lock washer cabinet, 1 set lapping dies, 1 Manly ½ ton crane, 1 Tractor Motor stand, 1 Model A & T Motor stand, 1 Press stand, 1 model A & T Reaming & Rehoning machine, 1 Dixe Rear End stand, 1 kink wag valve machine, 1 Arbor Press, 1 drill machine Superior, 1 lot of Lincoln Tools & Cabinet, 3 tool benches steel, 1 forge, 1 large tool bench, & equipment attached, 1 Generator stand, 1 emery stone stand, 1 Bean water pressure pump, 1 lot of small tools, 1 time clock, 1 desk, 1 coil tester, 3 electric drills, 3 sets chain blocks, 1 set model A Rebabiting Tools & Desk, 1 set Model T Rebabiting Tools, 1 Manley Jack, 2 lift jacks, 1 burning in stand, 1 radiator stand, 1 magnet recharger, 1 lifter car, 1 Manley grease rack, 1 Alemite Equipment complete, 1 air compressor, 1 wooden bench, 1 shop truck, 1 welding outfit, 1 porto stat, 2 Rebabiting torches com-

plete, 1 Tractor Rebabiting outfit, 1 Battery recharger outfit, 1 Cadillac Car with Crane, 1 Brake lining machine, 1 set of Tractor tools, 1 Dodge Roadster, 1 Ford Roadster, 2 old Ford Touring Cars, 1 Ford Coupe, 1 Ford Model A Tudor wrecked, 1 Buick Roadster, 2 Ford Touring Cars, 1 Essex Coach, 1 Moon Touring Car, 1 Ford Fordor Car, 1 Ford Tudor Car.

And all of Defendant's other personal property seized and taken in execution as the property of King Motor Company, by W. A. King, President, which you took, and which remains in your hands unsold for want of buyers, as you returned to our Judges, at our County Court of Common Pleas, on the third Monday of April you expose to sale, and the money thereof amounting to Six Thousand seven hundred eighty eight & 60-100 dollars lawful money of the United States which John N. Minnich lately in our County Court of Common Pleas, before our Judges at Bedford, recovered against King Motor Company, by W. A. King, President, for its debt as also $1.75 for costs which sustained by occasion of the detention of that debt whereof the said King Motor Company, by W. A. King, President, is convict as appears of Record. And have that money before our Judges, at Bedford, at our County Court of Common Pleas, there to be held on the Third Monday of September next, to render the said John N. Minnich for its debt and costs aforesaid. And have you then and there this writ.

Witness the Honorable Thos. F. Bailey, Esquire, President Judge of our said Court at Bedford, the 18th day of April Anno Domini, one thousand nine hundred and 29.

(Sgd.) H. J. PLEACHER,
Prothonotary.

September 16, 1929, goods on hand not sold. Writ not executed for want of time.

So answers,

(Sgd.) J. M. FINK, Sheriff.

Al. Vend. Ex. No. 12 November Term, 1929, issued September 4, 1929, to Vend. Ex. No. 12 September Term, 1929; returned 2nd Monday of November, 1929.

(Writ same as Vend. Ex. No. 12 September Term, 1929, except as to return day and test.)

November 11, 1929, goods on hand not sold.

So answers,

(Sgd.) J. M. FINK, Sheriff.

First Pluries Vend. Ex. No. 14 January Term, 1930, issued November 13th, 1929, to Al. Vend. Ex. No. 12 November Term, 1929; returnable 3rd Monday of January, 1930.

(Writ same as Vend. Ex. No. 12 September Term, 1929, except as to return day and test.)

Goods on hand not sold, writ not executed for want of time.

So answers,

(Sgd.) J. M. FINK, Sheriff.

Second Pluries Vend. Ex. No. 16 April Term, 1930, issued January 22, 1930, to 1st Plu. Vend. Ex. No. 14 January Term, 1930; returnable 3rd Monday of April, 1930.

(Writ same as Vend. Ex. No. 12 September Term, 1929, except return day and test.)

April 21, 1930, goods on hand not sold, writ not executed for want of time.

So answers,

(Sgd.) J. M. FINK, Sheriff.

Third Pluries Vend. Ex. No. 22 September Term, 1930, issued April 30, 1930, to 2nd Plu. Vend. Ex. No. 17 April Term, 1930; returnable 1st Monday of September, 1930.

(Writ same as Vend. Ex. No. 12 September Term, 1929, except return day and test.)

Endorsement on writ:

August 25, 1930, this writ is stayed by order of court.

Fieri Facias No. 63 April Term, 1929, John N. Minnich vs. King Motor Company, by W. A. King, President, issued out of the Court of Common Pleas of Bedford County, Pennsylvania, to No. 191 of April Term, 1929, levy endorsed thereon and return.

(This writ, the receipt, endorsement of levy and return are the same as Fi. Fa. No. 62 April Term, 1929, except as to amount of debt which in this writ is Eight Hundred Dollars.)

Vend. Ex. No. 13 September Term, 1929, issued to Fi. Fa. No. 63 April Term, 1929.

(Writ and return same as Vend. Ex. No. 12 September Term 1929 except as to amount of debt which in this writ is $800.00.)

Al. Vend. Ex. No. 9 November Term, 1929, issued September 4, 1929, to Vend. Ex. No. 13 September Term, 1929.

(Writ and return same as Al. Vend. Ex. No. 12, November Term, 1929, except as to amount.)

First Pluries Vend. Ex. No. 13 January Term, 1930, issued November 13, 1929, to Al. Vend. Ex. No. 9 November Term, 1929.

(Writ and return same as 1st Plu. Vend. Ex. No. 14 January Term, 1930, except as to amount.)

Second Pluries Vend. Ex. No. 17 April Term, 1930, issued January 22, 1930, to 1st Plu. Vend. Ex. No. 13 January Term, 1930.

(Writ and return same as 2nd Plu. Vend. Ex. No. 16 April Term, 1930, except as to amount.)

Third Pluries Vend. Ex. No. 23 September Term, 1930, issued April 30, 1930, to 2nd Plu. Vend. Ex No. 17 April Term, 1930.

(Writ and endorsement same as 3rd Plu. Vend. Ex. No. 22 September Term, 1930, except as to amount.)

SHERIFF'S ADVERTISEMENT OF SALE
(Posted Aug. 21, 1930.)

SHERIFF'S SALE

By virtue of sundry writs of 3rd Plu. Vend. Ex. and Clause of Fi Fa. added to Vend. Ex. issued out of the Court of Common Pleas of Bedford County, and to me directed, there will be exposed to public sale at the Garage of KING MOTOR CO., in Bedford Borough, County of Bedford and State of Pennsylvania on Friday the 29th day of August, 1930, the following property, viz: 1 Ford Pick-up Truck; 1 Tudor Sedan; 2 spring racks; 3 Fordor Sedans; 4 Coupes; 3 desks; 2 set of shelving; 7 chairs; 2 sets steel bins; 2 safes; 1 glass rack; 2 typewriters; 1 adding machine; 1 mimeograph machine; 2 coat racks; 2 electric fans; 1 filing case; 2 small filing cabinets; 1 check writing machine; 1 lot of auto parts; 1 lot of accessories; 5 bins of parts; 2 wheels and tire racks; 1 work table; 1 invoice machine; 1 show case; 1 rack for long parts; 3 sections of cabinets for small parts; 1 tool board on rollers; 2 tool cabinets; 1 bolt and lock washer cabinet; 1 set lapping dies; 1 Manly ½ ton crane; 1 tractor motor stand; 1 model A & T motor stand; 1 press stand; 1 model A & T reaming and rehoning machine; 1 Dixie rear end stand; 1 King Wag valve machine; argor press; 1 drill machine; 1 lot of Lincoln tools & cabinet; 3 steel tool benches; 1 forge; 1 large tool bench & equipment attached; 1 generator stand; 1 emery stone stand; 1 Bean water pressure pump; 1 lot of tools; 1 time clock; 1 desk; 1 coil tester; 3 electric drills; 3 sets chains blocks; 1 set Model A rebabiting tools; desk; stand; 1 radiator stand; 1 magnet recharger; 1 lifter car; 1 Manley grease rack; 1 Alemite equipment complete; 1 air compressor; 1 wooden bench; 1 shop truck; 1 welding out-fit; 1 ponto stat; 2 rebabiting torches; 1 tractor rebabiting out-fit; 1 battery recharger; 1 Cadillac car with crane; 1 brake lining machine; 1 set of tractor tools; 1 Dodge roadster; 2 old Ford Touring cars; 1 Ford Coupe; 1 Ford Model A Tudor wrecked; 1 Buick roadster; 2 Ford Touring cars; 1 Essex Coach; 1 Moon Touring car; 1 Ford Fordor car;

1 Ford Tudor car; 1 chair; 1 air compressor; 10 steel bins; 1 display case; 1 valve grinding machine; 1 Essex Coupe, engine No. 802598; 1 International Truck; 1 Reo Truck; 1 Pontiac Sedan, engine No. 353347; 1 Reo Truck; 1 Star Sedan; 1 Ford Coupe, engine No. 12267522; 1 Buick Touring; 1 Ford Truck; 1 Ford Sedan, engine No. 8119616; 1 Dodge, engine No. A381-68; 1 Ford Touring, engine No. 7688176; 1 Overland Sedan, engine No. 143412; 1 Buick Coupe, engine No. 1434231; 1 Studebaker Sedan; 1 Overland Touring; 1 Buick Touring, engine No. 804912; 1 Ford, engine No. 9723464; 1 Ford Sedan, engine No. A3536034; Gasoline—air craft, 54 gallons; H. E. Gasoline, 54 gallons; Motor Gasoline, 90 gallons; 30 gal. heavy medium oil; 14 gal. heavy oil; 19 gal. extra heavy oil; 12 gal. Arctic oil and all of the defts. other personal property.

SEIZED and taken in execution and to be sold as the property of KING MOTOR COMPANY.

Sale to commence at 9 o'clock a. m. of said day.

(Sgd.) J. M. FINK, Sheriff.

Sheriff's Office, Bedford, Pa.,
August 21, 1930.

ORDER OF COURT STAYING WRITS OFFERED IN EVIDENCE

In the Court of Common Pleas of Bedford County, Pennsylvania, No. 2 September Term, 1930, Sitting in Equity, W. A. King, Plaintiff vs. King Motor Company, Defendant, Bill of Complaint for a receiver.

And now, August 25th, 1930 . . . . . I hereby appoint D. C. Reiley as temporary Receiver of the King Motor Company and it is further ordered that all executions shall be stayed until the final determination of this matter.

Per cur

(Sgd.) THOS. F. BAILEY, P. J.

PETITION FOR REVIEW
(Filed Oct. 31, 1932.)

To the Honorable, Eben H. Pennell,
Referee in Bankruptcy.

The petition of Russell Gardner, Albert Barkman, Frank James, Clarence H. Smith, Grant Grimes, Randolph Burkett, James Perdew, Alton Drenning, David Bloom, Donald Smith, W. M. Williams, Melvin Blankley, Henry F. Kagarise, R. L. Housel, J. King Henry, John Stiver and Esther Kauffman respectfully shows:

That on the 21st day of October 1932 in the aforesaid bankruptcy proceeding, the learned Referee entered an order of distribution, a copy of which order is attached hereunto.

That your petitioners verily believe that the aforesaid order is erroneous, desire a review thereof, and file the following exceptions thereto and the following assignments of error, namely:

1. That the learned Referee erred in that he failed to distribute to your petitioners, and each of them, wage claimants, in full for the amounts owing to your petitioners respectively, not in excess of $600.00 each, your petitioners being entitled to priority of distribution as wage claim claimants under the Bankruptcy Statute.

2. The learned Referee erred in so much of his aforesaid order as directs distribution on the judgment of John N. Minnich at No. 190 April Term 1929, Court of Common Pleas of Bedford County, Pennsylvania, and on the judgment of John N. Minnich at No. 191 April Term 1929, Court of Common Pleas of Bedford County, Pennsylvania, ahead of your petitioners.

3. That the learned Referee erred in so much of said order as holds that the said John N. Minnich had a lien by virtue of any writs issued on either of the two aforesaid judgments.

4. That the learned Referee erred in that he failed to find that the purported execution liens of John N. Minnich, if otherwise valid, were void under Section 67-f of the Act of Congress relating to bankruptcy.

5. The learned Referee erred in his 11th finding of fact on page 9 and in his 22nd finding of fact on page 10 of his distribution that the executions of John N. Minnich were not stayed by the Court "until the final determination of the matter."

6. The Referee erred in his 29th finding of fact for the reason that your petitioners were not parties to any decision, if any was made, that any goods upon which John N. Minnich had a purported execution lien represented fifty per cent of the selling price of all the personal property or $1776.17.

7. The learned Referee erred in his 30th finding of fact on page 11 of the distribution that the levies of John N. Minnich on the personal property of the bankruptcy "were kept alive by the proper issuing of Vendices."

8. The learned Referee erred in his 31st finding of fact on page 11 of his distribution "that any delay by John N. Minnich was in good faith and in furtherance of a genuine intention to collect his debt."

9. The learned Referee erred in his 32nd finding of fact on page 11 of his distribution "that the said John N. Minnich did not in fact hinder any creditors or later executions."

10. The Referee erred in his 33rd finding of fact on page 11 of his distribution "that the executions of John N. Minnich are a valid lien, more than four months old, upon the personal property of the King Motor Company levied upon on March 26, 1929.

11. The learned Referee erred in his 34th finding of fact on page 11 of his distribution that the sum of $1776.17, or any sum, must be applied to the purported execution liens of John N. Minnich.

12. The learned Referee erred in his statement on page 12 of his distribution that "the execution and levy in the Court of Common Pleas of Bedford County, Pennsylvania, by the Creditor more than four months before the bankruptcy gave a lien upon bankrupt's property to the extent of the judgment, interest and costs."

13. The learned Referee erred in his finding on page 12 of his distribution that "this lien being obtained more than four months prior to the filing of the petition, is not only not to be deemed null and void, but its validity is recognized. The Trustee was vested by operation of law with the title of the bankrupt subject to this lien."

14. The learned Referee erred in his statement on page 12 of his distribution that "under the laws of the State of Pennsylvania the lien was not void."

15. The learned Referee erred in his statement on page 13 of his distribution that "the evidence shows that the creditor John N. Minnich issued his writ with an intention to collect his money and that he never relinquished or interrupted, there was no intention to refrain from exacting payment, or of helping the debtor to hinder other creditors and the Referee is of the opinion that the creditor acted in good faith. And in this case it was good business policy to indulge when we consider creditors executions amount to almost $9,000.00 and that he realizes less than $2,000.00."

16. The learned Referee erred in his conclusion and opinion that John N. Minnich acted in good faith, that he did not hinder anyone and that he had a lien.

17. The learned Referee erred in his conclusion as set forth on page 14 of his distribution that the fact that John N. Minnich gave specific directions in writing to the Sheriff on August 31, 1930, revived the priority of his purported lien even though the same had become dormant.

18. The learned Referee erred in holding that John N. Minnich had a lien by virtue of his executions for the

reason, among others, that the said John N. Minnich knew, as shown by the testimony of W. A. King, on July 22, 1932, (page 7 et sec) at the time he issued his executions that the King Motor Company was insolvent and in a very involved financial condition and agreed to attempt to continue and did attempt to continue his execution liens and allowed the corporation to operate its business to give it a chance to work out, the business being continued entirely the same as if no executions had been issued; the Sheriff never having taken possession of the personal property of the corporation and the said personal property being sold from time to time in due course of business, their being no bona fide intention to collect but simply to attempt to continue the liens for approximately eighteen months.

WHEREFORE, your petitioners, desiring a review by the United States District Court for the Western District of Pennsylvania, of the findings, conclusions and order made and entered by the Referee in Bankruptcy on October 21, 1932, file this their petition for review and pray that the aforesaid order, together with the proofs of claim, including all petitions, proofs or affidavits on which the alleged priority items hereinabove complained of were allowed, and the transcript of testimony and offers of counsel taken before said Referee, from which the findings of fact contained in the aforesaid order were made, be certified to the District Court of the United States for the Western District of Pennsylvania for review as provided by law and by the General Orders.

(Sgd.) KOUNTZ AND FRY,
(Sgd.) J. COLVIN WRIGHT,
Attorneys for Russell Gardner, Albert Barkman, Frank James, Clarence H. Smith, Grant Grimes, Randolph Burkett, James Perdew, Alton Drenning, David Bloom, Donald Smith, W. M. Williams, Melvin Blankley, Henry F. Kagarise, R. L. Housel, J. King Henry, John Stiver and Esther Kauffman.

State of Pennsylvania,)
County of Bedford,) ss:

Russell Gardner being duly sworn, deposes and says that he is one of the petitioners herein, and that the statements in the foregoing petition are true, to the best of his knowledge, information and belief.

(Sgd.) RUSSELL GARDNER.

Sworn and subscribed before me
this 31st day of October 1932.

(Sgd.) MARIE EARNEST DIVELY,
(SEAL) Notary Public.
My commission expires March 9, 1935.

REFEREE'S CERTIFICATE ON REVIEW
(Filed Nov. 10, 1932.)

To the Honorable District Judge:

I, Eben H. Pennell, the referee in bankruptcy in charge of this proceeding, do hereby certify:

That in the course of such proceeding, an order, to wit, a schedule of distribution of the bankrupt estate by Eben H. Pennell, Referee, a copy of which is annexed to the petition hereinafter referred to, was made and entered on the twenty first day of October, 1932.

That, on the twenty first day of October, 1932, Russell Gardner, et al., certain labor-claimants, feeling aggrieved thereat, filed a petition for review, which was granted.

That the errors complained of by the petitioners being eighteen in number, are set forth in full in his petition.

That a summary of the evidence on which such order was based is as follows:

That testimony taken before the referee at the Fifth meeting of creditors on July 15, 1932, and at an adjournment of said fifth meeting of creditors on July 22, 1932.

That the questions presented on this review are two in number:

First. "Did the Referee err in his 33rd finding of fact on page 11 of his distribution in holding? "That the executions of John N. Minnich are valid liens, more than four months old, upon the personal property of the King Motor Company levied upon March 26, 1929."

Second. Did the Referee err in his 34th finding of fact on page 11 of his distribution in holding? "That the sum of $1776.17 or any sum, must be applied to the execution liens of John N. Minnich out of the personal property fund before any of the money in the personal property fund was applied to the payment of the preferred labor claims.

I hand up herewith for the information of the Judge, the following papers:

1. The Petition for review on which this certificate is granted.

2. The Distribution of the bankrupt estate by the Referee dated October 21, 1932.

3. The testimony taken before the referee at the fifth meeting of creditors July 15, 1932, and the adjournment thereof July 22, 1932.

Respectfully submitted,

(Sgd.) EBEN H. PENNELL,
Referee in Bankruptcy.

November 4, 1932.

ORDER OF COURT AND EXCEPTION THERETO
(Filed Dec. 19, 1932.)

This cause came to be heard on the Referee's Certificate on Review filed in this proceeding November 10th, 1932, and after arguments of counsel, it is ordered, adjudged and decreed this 19th day of December, 1932, that the two items of John N. Minnich in the respective amounts of $1562.68 and $195.11 shown in the Order of Distribution entered by the Referee in Bankruptcy October 20th, 1932, are not valid liens against the fund, and are not entitled to any distribution ahead of the priority wage claims, and the Referee in Bankruptcy is directed to enter a new order of distribution so eliminating those two said items as liens; and it is ordered that the record be returned to the Referee in Bankruptcy so that he may enter an order of distribution in accordance with the direction herein contained.

(Sgd.) PER CURIAM
S.

To the foregoing Order John N. Minnich excepts this 19th day of December, 1932, and Bill is sealed.

(Sgd.) F. P. SCHOONMAKER (Seal)
United States District Judge.

Presentation of the foregoing Order may be made at any time and I waive notice thereof.

(Sgd.) JOHN N. MINNICH.

ASSIGNMENTS OF ERROR
(Filed Jan. 13. 1933.)

Now, comes John N. Minnich, complainant, and files the following assignment of errors on appeal from order of this court dated December 19th, 1932:

First. That the United States District Court for the Western District of Pennsylvania erred in finding that the two items of John N. Minnich in the respective

amounts of $1562.68 and $195.11 shown in the Order of Distribution entered by the Referee in Bankruptcy October 20th, 1932, are not valid liens against the fund.

Second. That the Court erred in finding that the above items are not entitled to any distribution ahead of the priority wage claims.

Third. That the Court erred in directing the Referee in Bankruptcy to enter a new order of distribution so eliminating those two said items as liens.

Fourth. The Court erred in failing to find that the levies of John N. Minnich under two executions issued out of the Court of Common Pleas of Bedford County, Pennsylvania, were valid liens upon the fund derived from the sale of the property levied upon by virtue of these executions.

Fifth. The Court erred in failing to find that these liens were entitled ahead of wage claimants to the fund derived from the sale of the property levied upon by virtue of the execution of John N. Minnich.

Sixth. The Court erred in failing to find that the Referee having found as a fact on June 8, 1931, that "This lien is valid and must stand," from which finding no review was asked or appeal taken, the matter is res judicata.

Seventh. The Court erred in failing to find that the wage claimants, having entered into an agreement with the First National Bank and Trust Company of Bedford, Pennsylvania, and other real estate lien creditors, whereby in consideration that certain taxes and expenses which had been charged to the general fund should be allowed out of the real estate fund, the wage claimants did waive all rights of action, which they had or could have for the recovery of any sum from the First National Bank and Trust Company of Bedford, Pennsylvania, arising from the delivery of certain automobiles to said Bank within

four months of the adjudication of the King Motor Company as a bankrupt, the said wage claimants are estopped from claiming any other moneys toward their claims.

Wherefore, he prays, that said order will be reversed and his lien allowed.

(Sgd.) JOHN N. MINNICH.

PETITION FOR APPEAL AND ORDER OF COURT
(Filed Jan. 13, 1933.)

John N. Minnich, a claimant, considering himself aggrieved by the order made and entered herein on December 19th, 1932, in the above entitled cause, does hereby appeal from such order and the provisions thereof to the United States Circuit Court of Appeals for the Third Circuit for the reasons specified in the assignment of errors which is filed simultaneously herewith, and he prays that this appeal and review may be allowed, and that a transcript of the record, papers and proceedings upon which such order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Third Circuit.

(Sgd.) JOHN N. MINNICH,
January 7th, 1933. Petitioner.
118 South Juliana Street,
Bedford, Pa.

The foregoing appeal is hereby allowed.

(Sgd.) F. P. SCHOONMAKER,
January 13, 1933. U. S. D. J.
(Sgd.) Per Gibson.

ORDER OF COURT FOR RECORD ON APPEAL
(Filed April 22, 1933.)

And now, April 22nd, 1933, after hearing on the exceptions filed to the praecipe for record, it is ordered that the record, to be printed for the appeal, shall consist of the following:

1. Docket entries.

2. The paper bearing the Referee's date October 20, 1932, and filed in this Court November 10, 1932, captioned "Distribution of the bankrupt estate by the Referee."

3. The summary of evidence filed the 25th day of March, 1933.

4. The petition for review.

5. Referee's certificate on review filed the 10th day of November, 1932.

6. Order of Court of December 19, 1932, and exception thereto.

7. Petition for appeal and order allowing appeal.

8. Assignments of error.

9. This order.

(Sgd.) PER CURIAM.

S.

By consent:

(Sgd.) W. E. KOUNTZ, Atty. for Appellees.

(Sgd.) JOHN N. MINNICH, Appellant.

CERTIFICATE

WESTERN DISTRICT OF PENNSYLVANIA, SS:

I, J. Wood Clark, Clerk of the District Court of the United States for the Western District of Pennsylvania do hereby certify that the annexed and foregoing pages contain a true and correct copy of the record sur Appeal in the above entitled case, so full and entire as the same remains of record and on file in my office, in the City of Pittsburgh, in said District.

In Testimony Whereof, I have hereunto signed my name and affixed the seal of the said Court, at Pittsburgh this day of , A. D. 1933.

(SEAL) J. WOOD CLARK,
Clerk

Minute entry of argument and submission, May 31, 1933, omitted in printing.

In United States Circuit Court of Appeals for the Third Circuit, March Term, 1933

No. 5088

John N. Minnich, Appellant,

v.

Russell Gardner et al., Intervening Creditors, and D. C. Reiley, Esq., Trustee of King Motor Co., Bankrupt, Appellees

Upon Appeal from the District Court of the United States for the Western District of Pennsylvania

Opinion Filed July 12, 1933

Before Woolley, Davis, and Thompson, Circuit Judges.

Thompson, Circuit Judge:

This is an appeal from a final order and decree of the District Court for the Western District of Pennsylvania sitting in bankruptcy. On March 21, 1929, the appellant entered a judgment against the King Motor Company in the Court of Common Pleas of Bedford County. On March 26, 1929, he caused execution to be issued upon the judgment. On March 27, 1929, the sheriff levied upon the personal property of the King Motor Company and endorsed his levy upon the writ. On April 15, 1929, the sheriff returned "goods on hand not sold". On April 18, 1929, the appellant caused a writ of vend. ex. to be issued; on September 4, 1929, an alias writ of vend. ex.; and on November 14, 1929, January 22, 1930, and April 30, 1930, pluries writs of vend. ex. Each of these writs was returned by the sheriff, either with the endorsement "goods on hand not sold, writ not executed for want of time", or "goods on hand not sold". On August 21, 1930, the appellant instructed the sheriff to advertise the goods of the King Motor Company for sale and to sell the same immediately.

On August 25, 1930, a receiver in equity was appointed for the King Motor Company by the Court of Common Pleas of Bedford County. The sheriff advertised on August 21, 1930. On August 30, 1930, an involuntary petition in bankruptcy was filed against the King Motor Company which was adjudged a bankrupt on September 19, 1930, and a trustee in bankruptcy appointed. Written notice was given to the trustee that the appellant had a lien upon the personal property of the King Motor Company because of the levy of March 27, 1929. All of the personal property of the company was sold. It was agreed by the trustee and the appellant that fifty per cent of the proceeds of the sale represented the value of the property which had been levied upon by the appellant. The referee awarded this sum to the appellant as a lienor. Upon the referee's certificate for review, the District Court decreed that the writs of execution did not entitle the appellant to valid liens against the fund nor to any distribution in preference to the priority wage claims. No opinion was filed by the District Court.

In Platt-Barber Co. v. Groves, 193 Pa. 475, the court said:

"The rule is well established that an execution which is not put in the sheriff's hands with the bona fide intention of collecting the debt, but merely to be held as a security, or to prevent other creditors from coming upon the debtor's goods, is fraudulent as to them, and will be postponed to subsequent levies. And stay, or unusual delay of the proceedings, allowing the debtor to sell or otherwise to deal with the goods in contravention of the levy, and other acts of similar nature, give rise to a presumption of want of good faith. Dorrance's Admr. v. Com., 13 Pa. 159; Earl's Appeal, 13 Pa. 483; Freeburger's Appeal, 40 Pa. 244."

A lien claimant undoubtedly is entitled to rebut the presumption of want of good faith. Under the facts, we reach the conclusion that the appellant, the lien claimant here, made his levy solely for the purpose of acquiring a lien and without a genuine intention of proceeding promptly for the collection of his debt. He postponed all action until such time as the debtor was obviously insolvent and within four months of the bankruptcy. He has not met

the test of good faith and has therefore failed to establish liens upon the fund.

The decree is affirmed.

A true Copy: Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

In United States Circuit Court of Appeals for the Third Circuit, March Term, 1933

No. 5088

John N. Mixnich, Appellant,

vs.

Russell Gardner et al., Intervening Creditors, and D. C. Reilly, Esq., Trustee of King Motor Co., Bankrupt, Appellees

Decree—Filed July 12, 1933

Appeal from the District Court of the United States for the Western District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, July 12, 1933.

J. W. Thompson, Circuit Judge.

[File endorsement omitted.]

[File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed Aug. 2, 1933

To the Honorable the Justices of the United States Circuit Court of Appeals for the Third Circuit:

John N. Minnich, appellant in the above stated case, hereby petitions your Honorable Court for a rehearing in this cause for the following reasons:

That an error exists in the chronology of the proceedings as detailed in the statement of facts in your opinion filed in this case on July 12, 1933, and it is evident that your Honorable Court decided the case with a misunderstanding of the facts. This misunderstanding is of the time when the sheriff advertised the property for sale which is the controlling act of this case. Your Honorable Court in its opinion stated:

"On August 21, 1930, the appellant instructed the sheriff to advertise the goods of the King Motor Company for sale and to sell the same immediately. On August 25, 1930, a receiver in equity was appointed for the King Motor Company by the Court of Common Pleas of Bedford County. The sheriff advertised on August 29, 1930. On August 30, 1930, an involuntary petition in bankruptcy was filed against the King Motor Company * * *."

The appointment of a receiver is given as antedating the advertisement by the sheriff. The correct facts are that on August 21, 1930, the appellant instructed the sheriff to advertise and the sheriff advertised on August 21, 1930 (R. 14, 15, 38-39). On August 25, 1930, a receiver was appointed and on August 30, 1930, the involuntary petition in bankruptcy was filed. The advertisement of the sale of the property by the sheriff on August 21, 1930, was the positive action which revived the priority of the lien of the appellant and this revival was four days before a receiver was applied for and nine days before the petition in bank-

ruptcy was filed. With the facts of this case corrected they are precisely similar to the facts of In re Zeis, 245 F. 737 (C. C. A. 2) and In re Schwab Printing Co., 59 F. (2d) 726 (C. C. A. 7) and appellant respectfully submits that these citations should control.

At the argument of this case the time was too limited, owing to the arrival of the hour for adjournment, for the appellant to fully present his contention to your Honorable Court. The appellant contends that the lien acquired by virtue of his levy, even if liable to be postponed by subsequent levies, which is all that has ever been held to result from a dormancy in any Pennsylvania case (including Platt-Barber Co. v. Groves cited by your Honors), was good as against the debtor. That the appellant having given positive instructions to the sheriff to proceed and positive action having been taken by the sheriff by posting the advertisement of the sale of the property four days before any action for a receiver and nine days before the filing of the petition in bankruptcy, this positive action revived the priority of his lien. That the revival was not of the lien but of its priority and dated back to the time of the levy, and no new lien was created at this time which would be void because within the four months period under section 67 (f) of the Bankruptcy Act. This has been clearly held in In re Zeis, supra, and in that case action was postponed by the execution creditor in a hope that bankruptcy proceedings could be avoided.

In its opinion your Honorable Court holds that appellant "postponed all action until such time as the debtor was obviously insolvent * * *." It is respectfully submitted that with the facts corrected no evidence appears in the record to support this conclusion.

Your petitioner therefore prays your Honorable Court to set the above matter down for reargument and that a day be set so that the interested parties may appear and that the record be retained by your Honorable Court until an opportunity has been given plaintiff to be heard.

And he will ever pray, etc.

John N. Minnich, Appellant.

Duly sworn to by John N. Minnich. Jurat omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed Oct. 2, 1933

And now, to wit, October 2, 1933, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia.

J. W. Thompson, Circuit Judge.

[File endorsement omitted.]

Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 15, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,272. U. S. Circuit Court of Appeals, Third Circuit. Term No. 669. John N. Minnich, Petitioner, vs. Russell Gardner et al., Intervening Creditors, and D. C. Reiley, Trustee of King Motor Co., Bankrupt. Petition for a writ of certiorari and exhibit thereto. Filed December 18, 1933. File No. 669. O. T., 1933.